THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS SUPERIOR COURT

NORTHERN DISTRICT 2002

No. 00-E-0299
Robert and Cynthia Engelhardt

v.

Concord Group Insurance Companies

ORDER

Robert and Cynthia Engelhardt ("the petitioners") bring the instant petition for declaratory judgment against Concord Group Insurance Companies[1] ("the respondent"). The petitioners seek a determination as to whether the respondent must provide underinsured motorist coverage under a business auto policy for injuries sustained by petitioner Robert Engelhardt in an automobile accident caused by a third party. In its order of July 27, 2001, the Court granted summary judgment in favor of the respondent on most issues. The Court reserved for trial, however, the issue of whether representations made by the respondent and its agent resulted in the petitioners' having "reasonable expectations" of coverage under the commercial policy when using the family car for business purposes. See Trefethen v. N.H. Ins. Group, 138 N.H. 710, 714 (1994) (annunciating "reasonable expectations" doctrine). At the hearing held

[1] The respondent notes that Concord General Mutual Insurance, not Concord Group Insurance Companies, issued the insurance policies relevant to this matter. The petitioners erroneously captioned this case with "Concord Group Insurance Companies" and, for the sake of simplicity, the respondent has allowed itself to be referred to as such.

2/28/02, the petitioner raised an additional argument regarding policy interpretation.

After hearing, the Court finds the following pertinent facts. On July 17, 1999, petitioner Robert Engelhardt ("Mr. Engelhardt") suffered very serious injuries in a motor vehicle accident. Specifically, Mr. Engelhardt sustained injury to his legs which required the insertion of pins and rods, injury to his liver, and injury to his head that resulted in lingering memory loss and confusion. He remained in a coma for several days.

At the time of the accident, Mr. Engelhardt was operating a 1991 Plymouth Laser. Mr. William Cooke ("Cooke"), the driver of the other car involved, caused the accident. Cooke held an automobile insurance policy issued by Royal and Sunalliance Insurance Company ("Royal Insurance"), which paid Mr. Engelhardt $100,000, the applicable limit under Cooke's liability coverage.

Approximately four years prior to the accident, the petitioners had gone to the Clark Mortenson Agency of Keene, New Hampshire ("the agency"). At the agency, the petitioners consulted with Mr. Earle Spofford ("Mr. Spofford") about purchasing automobile insurance for the family car and for a pick-up truck that Mr. Engelhardt had purchased for use in his newly formed painting business. In the course of this conversation, Mrs. Engelhardt asked Mr. Spofford whether she would be covered if she were driving the pick-up truck on a

personal errand. Mr. Spofford replied that she would be covered under the personal auto policy. Neither Mr. Engelhardt nor Mrs. Engelhardt asked specifically whether Mr. Engelhardt would be covered while operating the family car for business purposes, and Mr. Spofford made no express representation to that effect.

Ultimately, the petitioners purchased two automobile insurance policies issued by the respondent. The first is a personal automobile insurance policy, No. N686071-5 ("the personal policy"), which covers the family's 1991 Plymouth Laser. The second policy is a commercial automobile insurance policy, No. C632276-9 ("the commercial policy"), covering Mr. Engelhardt's 1992 Subaru pick-up truck that he uses for his painting business. The personal policy provides uninsured motorist coverage up to a maximum of $100,000 per person and, subject to the per person limit, $300,000 per accident. The commercial policy provides single limit uninsured motorist coverage in the amount of $300,000.

Mrs. Engelhardt testified that both policies arrived in the mail a short time later. She skimmed the coverage page to determine that the amounts accurately reflected the amount of coverage the petitioners had requested, but did not read the policies in their entirety. She filed the policies. In the same manner, she filed any correspondence she occasionally received regarding the policies.

Over the years, whenever Mr. Engelhardt replaced his truck, Mrs. Engelhardt phoned the insurance agency to report the change. In each instance, the commercial policy's Declarations page was amended to reflect the change. When Mrs. Engelhardt purchased a Subaru in 1998, she phoned the agency and had the new car added to the personal policy. Her use of the Plymouth Laser greatly decreased after the purchase, and Mr. Engelhardt began using the Plymouth Laser much more frequently for business-related errands. Mrs. Engelhardt did not alert the agency as to the change in the Plymouth's predominant use.

Mr. Engelhardt continued to use both the truck and the Plymouth Laser for business-related activity, although only the truck was listed on the coverage selections page of the commercial policy. When the accident occurred, Mr. Engelhardt was driving the Plymouth. Alleging damages in excess of the $100,000 collected from Royal Insurance, Mr. Engelhardt filed a claim with the respondent pursuant to his underinsured motorist coverage under both the personal and commercial policies. The respondent denied Mr. Engelhardt's claim under the commercial policy and the petitioners initiated the instant proceeding.

DISCUSSION

The petitioners argue that the household exclusion does not apply in this case because prior dealings between themselves and the respondent gave rise to a reasonable expectation that Mr.

Engelhardt would be covered under the commercial policy even when operating the Plymouth. See Trefethen v. New Hampshire Ins. Group, 138 N.H. 710, 715 (1994) (discussing reasonable expectations doctrine). Having carefully examined the Trefethen case, the Court finds it distinguishable from the case at bar and rules that the petitioners' expectation of coverage does not come within the definition of "reasonable expectations" as articulated in Trefethen.

Trefethen and other cases have found coverage despite express, unambiguous exclusionary terms contained in the policy when the insured sought coverage for a specific risk and articulated that specific need to the insurance agent. The agent in each case simply failed to provide the requested coverage or in some instances actively mislead the insured into believing that such coverage existed. See Trefethen, 138 N.H. at 711 (noting insured had requested coverage encompassing "every saleable item" but instead received coverage excluding damages arising from sale of liquor); Lariviere v. New Hampshire Ins. Group, 120 N.H. 168, 172 (1980) (observing insured had discussed purported exclusion with insurance agent who had led him to believe exclusion did not apply to specific risk he sought to insure against). Contrary to the petitioners' view, the reasonable expectations approach does not encompass their situation because the petitioners never communicated to the agent

a desire that the commercial policy apply to both vehicles. At most, the petitioners formed an unspoken and inaccurate assumption that Mr. Engelhardt would be covered under the commercial policy even when driving the Plymouth, which was not listed on that policy's coverage page. Cf. Trefethen, 138 N.H. at 711 (noting insured expressly requested coverage for "every saleable item").

The Trefethen court also emphasized that the insured in that case had not yet received the updated policy language updating the exclusion and thus had no notice whatever of the liquor exclusion. Trefethen, 138 N.H. at 714. There is no dispute that the petitioners received the commercial policy years before the accident. They had more than ample time to read its terms and ask questions if they did not understand the policy. See generally Robbins Auto Parts, Inc. v. Granite State Ins. Co., 121 N.H. 760 (1981) (finding reasonable expectations analysis inapplicable and discussing policy's express language).

The Court recognizes that, as a practical matter, insurance policy language is often dense and difficult to comprehend. Under existing New Hampshire jurisprudence, however, an insured is held to the standard of a reasonable person in the position of the insured giving the whole policy a "more than casual reading." Hudson v. Farm Family Mut. Ins. Co., 142 N.H. 144, 146 (1997). The petitioners, having had an opportunity to read the policy,

should reasonably have seen that it expressly and unambiguously excluded coverage in this case. Any expectations Mr. and Mrs. Engelhardt may have had that contradicted the express language of the policy were therefore unreasonable. Under such circumstances, the express terms of the policy govern. Consequently, the petitioners are not entitled to coverage under the commercial policy based on the reasonable expectations doctrine annunciated in Trefethen.

At the hearing on 2/28/02, the petitioners raised an additional argument that they are entitled to coverage under an endorsement to the commercial policy dated July 1, 1997. They maintain that, under Endorsement no. CA 99 17 07 97 ("the endorsement"), " ...any 'auto' you own of the 'private passenger type' is a covered 'auto' under liability coverage..." See Petitioners' Trial Memorandum on Issue of July 1, 1997 Endorsement (#CA 99 17 07 97) at 3. The pertinent phrase in its entirety provides:

> **INDIVIDUAL NAMED INSURED**
>
> 2. PERSONAL AUTO COVERAGE
> While any "auto" you own of the "private passenger type" is a covered "auto" under Liability Coverage:
> [certain coverage changes apply] .
> . . .

Endorsement, "Individual Named Insured," at A(2) (emphasis added). In the petitioners' view, the endorsement modifies the

policy and makes the Plymouth a "covered auto" under the commercial policy because the Plymouth constitutes "a passenger type auto owned by Robert Engelhardt." See Petitioners' Trial Memorandum on Issue of July 1, 1997 Endorsement (#CA 99 17 07 97) at 4-5. The respondent replies that the petitioners have distorted the meaning of the endorsement language and taken it out of context by omitting the word "while."

The Court agrees with the respondent that the cited language cannot reasonably be interpreted as the petitioners propose. "While" when read in context can only mean "so long as," i.e. "so long as any auto you own of the private passenger type is a covered auto [certain provisions apply]." The endorsement defines autos of the "private passenger type" as *covered autos* that the insured owns, including pick-up trucks or vans "not used for business purposes." Endorsement, Section C, "ADDITIONAL DEFINITIONS," 3 (emphasis added). See Defendant's Exhibit A.

According to the Schedule of Coverages and Covered Autos portion of the commercial policy's Declarations Page:

> THIS POLICY PROVIDES ONLY THOSE COVERAGES WHERE ONE OR MORE OF THE COVERED AUTO DESIGNATION SYMBOLS ARE ENTERED BELOW. THESE SYMBOLS ALSO INDICATE WHICH "AUTOS" ARE COVERED "AUTOS". REFER TO SECTION I OF THE POLICY FOR A DESCRIPTION OF THE COVERED AUTO DESIGNATION SYMBOLS.

Commercial Policy, Declarations, ITEM TWO. See Defendant's Exhibit A. The same page indicates that the policy provides

coverage as described in designation number "7." Section I, entitled "COVERED AUTOS," provides:

> ITEM TWO of the Declarations shows the "autos" that are covered "autos" for each of your coverages. The following numerical symbols describe the "autos" that may be covered "autos". *The symbols entered next to a coverage on the Declarations designate the only "autos" that are covered "autos".*
>
> 7 = SPECIFICALLY DESCRIBED "AUTOS"
> *Only* those "autos" described in ITEM THREE of the Declarations for which a premium charge is shown (and for Liability Coverage any "trailers" you don't own while attached to any power unit described in ITEM THREE).

Commercial Policy, Declarations, ITEM TWO (emphasis added). See Defendant's Exhibit A. The only "covered auto" listed in ITEM THREE of the Declarations Page is Mr. Engelhardt's pick-up truck. Viewing the language in context as it relates to the rest of the endorsement and the policy, the Court finds and rules that it does not extend coverage to the petitioners' Plymouth, but rather is expressly limited to Mr. Engelhardt's pick-up truck used in his painting business.

The petitioners aver that, even if their definition is not the only one possible, that the endorsement language creates an ambiguity that must be resolved against the respondent. Policy terms create an ambiguity only when the parties reasonably may differ as to their interpretation. Funai v. Metro. Prop. and Cas. Co., 145 N.H. 642, 644 (2000) (citation and quotations omitted). "In determining whether an ambiguity exists, we take the plain and ordinary meaning of the policy's words in context .

. . ." Brouillard v. Prudential Prop. & Cas. Ins. Co., 141 N.H. 710, 712 (1997) (citation and quotations omitted). The Court will not create an ambiguity simply to resolve the issue of coverage against an insurer. Id. (citations and quotations omitted). Although the petitioners' situation is tragic, the Court cannot contort the clear language of the endorsement in order to create an ambiguity here.

In light of the foregoing findings and rulings, Robert and Cynthia Engelhardt's Petition for Declaratory Judgment is DENIED.

REQUESTS FOR FINDINGS AND RULINGS

The Court rules on Petitioners' Requests for Findings of Fact and Rulings of Law as follows:

GRANTED: 1 through 30, 35 through 50.

DENIED: 31 through 34.

So ordered.

Dated: April 9, 2002

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ARTHUR D. BRENNAN
PRESIDING JUSTICE